FILE COPY

No. 93-1005

Supreme Court, U
FILE
DEC 23 1993
OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

October Term 1993

THE HERTZ CORPORATION,

Cross-Petitioner,

v.

THE CITY OF NEW YORK, *et al.*,

Cross-Respondents.

CROSS-PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

PAUL C. SAUNDERS*
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

JOHN J. CALANDRA
SUJA A. THOMAS
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Cross-Petitioner

**Counsel of Record*

December 22, 1993.

QUESTIONS PRESENTED

I. Whether the Second Circuit erred in deciding that the Hertz Law was subject to a rule-of-reason rather than a *per se* analysis under Section 1 of the Sherman Act?

II. Whether the Second Circuit erred in deciding that the rule-of-reason analysis requires the district court to balance New York City's non-competitive justifications for the Hertz Law against the anticompetitive effect of the law?

LIST OF PARTIES

The parties are the same as those listed in the petition for a writ of certiorari filed in *City of New York v. Hertz Corp.*, No. 93-841.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

The parent companies and non-wholly owned subsidiaries of The Hertz Corporation are the same as those listed in the brief in opposition to the petition for certiorari filed in *City of New York v. Hertz Corp.*, No. 93-841.

IN THE

Supreme Court Of The United States

October Term 1993

THE HERTZ CORPORATION,

Cross-Petitioner,

v.

THE CITY OF NEW YORK, *et al.*,

Cross-Respondents.

CROSS-PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

We ask the Court to consider this cross-petition only if the Court grants the petition for a writ of certiorari filed in *City of New York v. Hertz Corp.*, No. 93-841. If the Court grants the petition, which we oppose as unwarranted and premature, we urge the Court also to grant this cross-petition, because the Court will then be able to consider all of the issues relevant to the antitrust implications of the Hertz Law.[1]

---

[1] The entire text of the Hertz Law is set out in the appendix to the petition for a writ of certiorari at A43-44. Hereinafter, references to a number preceded by an "A" are to the aforesaid appendix.

OPINIONS BELOW

The opinions below are the same as those listed in the petition for a writ of certiorari and are reproduced in the appendix to the petition.

JURISDICTION

Cross-petitioner seeks review of the decision of the Second Circuit rendered on August 2, 1993. This cross-petition is filed pursuant to Supreme Court Rule 12.3, in connection with the petition for a writ of certiorari that was received by cross-petitioner on November 26, 1993. The jurisdiction of the Court to review the judgment of the Second Circuit is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the same as those listed in the petition for a writ of certiorari.

STATEMENT OF THE CASE

The facts here are the same as those set forth on pages 1 - 2 of the brief in opposition to the petition for a writ of certiorari.

ARGUMENT

I. THE SECOND CIRCUIT ERRED IN DECIDING THAT THE HERTZ LAW WAS SUBJECT TO A RULE-OF-REASON RATHER THAN A *PER SE* ANALYSIS UNDER SECTION 1 OF THE SHERMAN ACT.

The Second Circuit incorrectly decided that the Hertz Law should be analyzed under the rule-of-reason test in order to determine whether it is preempted by Section 1 of the Sherman Act, 15 U.S.C. 1 (Supp. 1993). *See Hertz Corp. v. City of New York*, 1 F.3d 121, 129-31 (2d Cir. 1993).[2] Horizontal price-fixing,

---

[2] The opinion of the Second Circuit in *Hertz Corp. v. City of New York* is reprinted in its entirety at A1-24.

which the Hertz Law compels, is illegal *per se*. *See, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 644-45, 650 (1980) (Court held agreement among wholesalers to eliminate short-term trade credit on beer purchases illegal *per se*); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 221, 223-24 (1940) (Court held illegal *per se* combination of major oil companies to fix gasoline prices; "[a]ny combination which tampers with price structures is engaged in an unlawful activity"); *see also United States v. General Motors Corp.*, 384 U.S. 127, 145, 147-48 (1966) (Court held illegal *per se* agreement of dealers, orchestrated by manufacturer, not to sell to discount houses). Thus, the Hertz Law, which involves horizontal price-fixing by eliminating one aspect of price competition and requiring that the same prices be charged to all New York City residents, is unreasonable *per se* under the Sherman Act.

II. THE SECOND CIRCUIT ERRED IN DECIDING THAT THE RULE-OF-REASON ANALYSIS REQUIRES THE DISTRICT COURT TO BALANCE NEW YORK CITY'S NON-COMPETITIVE JUSTIFICATIONS FOR THE HERTZ LAW AGAINST THE ANTICOMPETITIVE EFFECT OF THE LAW.

The Second Circuit incorrectly decided that the rule-of-reason analysis requires the district court to balance New York City's non-competitive justifications for the Hertz Law against the anticompetitive effect of the law. *See Hertz*, 1 F.3d at 130-31. The rule-of-reason analysis, contrary to its name, "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions". *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688, 693-94 (1978) (Court refused to consider, under rule-of-reason analysis, whether "restraint on price competition ultimately inures to the public benefit"); *see, e.g., National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 103, 119-20 (1984) (NCAA agreement with CBS and ABC regarding televising college football games violates the Sherman Act pursuant to the

rule of reason, which is "'confined to a consideration of impact on competitive conditions'" (quoting *National Soc'y*, 435 U.S. at 690)). Therefore, only New York City's procompetitive justifications for the Hertz Law should be weighed against the anticompetitive effect of the law.

CONCLUSION

For the reasons stated above, cross-petitioner/respondent The Hertz Corporation requests the Court to grant this cross-petition only if the Court grants the petition for a writ of certiorari, which Hertz has urged the Court to deny.

December 22, 1993.

Respectfully submitted,

PAUL C. SAUNDERS*
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

JOHN J. CALANDRA
SUJA A. THOMAS
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Cross-Petitioner

**Counsel of Record*

Supreme Court, U.S.
FILED
JAN 21 1994
OFFICE OF THE CLERK

(2)

No. 93-1005

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE HERTZ CORPORATION,

Petitioner,

-against-

THE CITY OF NEW YORK, *et al.*,

Respondents.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LEONARD J. KOERNER,*
LAWRENCE S. KAHN,
ALAN G. KRAMS,
of Counsel.

PAUL A. CROTTY
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007
(212) 788-1031 or 1010

January 21, 1994

*Counsel of Record

BEST AVAILABLE COPY

LIST OF PARTIES

Petitioner, the plaintiff-appellant below, is The Hertz Corporation.

Respondents, the defendants-appellees below, are (i) The City of New York, (ii) Paul A. Crotty, in his official capacity as Corporation Counsel of the City of New York, and (iii) Richard Schrader, in his official capacity as Acting Commissioner of Consumer Affairs of the City of New York.[1]

---

[1]Messrs. Crotty and Schrader are substituted as parties automatically pursuant to Supreme Court Rule 35.3. They are the successors in office to O. Peter Sherwood and Mark Green, respectively. This substitution also applies to the petition for certiorari filed by the above-named parties, No. 93-841.

TABLE OF CONTENTS

Page

LIST OF PARTIES i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE CROSS-PETITION

I. There is no basis for finding that Int. No. 71-A imposes a restraint shown by experience to restrain trade unreasonably, hence the Court of Appeals was correct in determining that the ordinance is not illegal per se under the Sherman Act. 3

II. The Court of Appeals correctly decided that any rule-of-reason review of Int. No. 71-A could not be limited solely to the economic effects of the legislation. 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 3, 4

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988) 3, 4

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 5

Hertz Corp. v. City of New York, 1 F.3d 121 (2d Cir. 1993). 5, 6

National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984) 5

National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) 5

Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). 4

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE HERTZ CORPORATION,

Petitioner,

-against-

THE CITY OF NEW YORK, *et al.*,

Respondents.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the City of New York and two of its officials, respectfully pray that this Court deny the cross-petition for writ of certiorari seeking review of portions of the judgment of the United States Court of Appeals for the Second Circuit, entered on August 2, 1993.

STATEMENT OF THE CASE

Respondents rely on the Statement of the Case at pages 5-9 of their Petition for Writ of Certiorari, No. 93-841.

SUMMARY OF ARGUMENT

The Court of Appeals correctly ruled that, if the challenged ordinance is subject to section 1 of the Sherman Act, it is not illegal per se but is subject to review under the rule of reason. Per se illegality is applied only to economic restraints that experience has shown invariably violate section 1, such as horizontal price fixing. Hertz's claims notwithstanding, the challenged ordinance does not fix prices; it merely directs businesses not to use a car renter's residence as a basis for charging a different price, and it does not meet the stringent criteria for per se illegality.

The Court of Appeals was also correct in holding that noneconomic factors should be considered in any assessment of Int. No. 71-A under the rule of reason. Municipal legislation often responds to concerns broader than the purely economic interests that drive business decisions intended to enhance a business's competitive position. As the Court of Appeals explained, many such local legislative objectives also reflect important federal values, and any Sherman Act analysis of local legislation must recognize these interests as factors to be weighed when assessing an economic restraint under the rule of reason.

REASONS FOR DENYING THE CROSS-PETITION

I. There is no basis for finding that Int. No. 71-A imposes a restraint shown by experience to restrain trade unreasonably, hence the Court of Appeals was correct in determining that the ordinance is not illegal per se under the Sherman Act.

The Sherman Act is "intended to prohibit only unreasonable restraints of trade." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988). Generally, the reasonableness of a particular restraint "is determined through case-by-case application of the so-called rule of reason" -- a fact-based assessment of the effects of the challenged practice. *Id.* However, where extensive experience has shown that a given restraint is invariably unreasonable, that practice is "conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases and becomes a per se violation." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8, 7-9 (1979).

Per se illegality is not favored. "[T]here is a presumption in favor of a rule-of-reason standard; . . . departure from that standard must be justified by demonstrable economic effect . . . ." *Business Electronics*, 485 U.S. at 726. Per se analysis is used only where the challenged practice "almost always tends to restrict competition and reduce output." *Id.* at 726-727; *see also, Broadcast Music*, 441 U.S. at 19-20. Since such a determination necessarily requires a thorough understanding of the actual economic impact of a particular practice, "[t]he *per se* rule is not employed until after considerable experience with the challenged restraint."

Broadcast Music, 441 U.S. at 19 n.33; *see also Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1203 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

While Hertz cites cases for the undebatable proposition that horizontal price-fixing is illegal per se, Hertz cites nothing to support its contention that Int. No. 71-A is price-fixing legislation simply because it eliminates residence as a basis for setting different prices. *See* Cross-Petition for a Writ of Certiorari at 2-3. Hertz assumes that any restraint affecting price is a per se Sherman Act violation, but this Court has said that "[n]ot all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints." *Broadcast Music*, 441 U.S. at 23; *see also Business Electronics*, 485 U.S. at 728 (per se analysis not compelled simply because the challenged practice could lead to higher prices) *and* at 733 (attaching significance to the fact that challenged restraint did not involve actual agreement setting prices).

The restraint at issue here -- prohibition against using a renter's residence as a basis for charging different rental rates -- is far from the direct establishment of price levels that has long been held to be a per se violation of the Sherman Act. Hertz has cited nothing to show that past experience has persuasively demonstrated that this kind of restraint diminishes competition at all, much less that it invariably has such an effect. Accordingly, the Court of Appeals was correct in holding that the criteria for per se illegality are not present here. This holding takes on added force in view of this Court's observation that per se analysis may be inappropriate when assessing municipal activities since conduct considered anticompetitive when done by a private party may be seen differently when done by a municipality. *See Hertz Corp. v. City of New York*, 1 F.3d

121, 129 (2d Cir. 1993) (citing *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 56 n.20 (1982)).

II. The Court of Appeals correctly decided that any rule-of-reason review of Int. No. 71-A could not be limited solely to the economic effects of the legislation.

New York City's petition for a writ of certiorari explains that an unfortunate consequence of the Court of Appeals' erroneous determination that Int. No 71-A is not unilateral action is the need for a trial balancing Hertz's claims about the economic effect of the ordinance against the City's more varied reasons for enacting it, thereby returning federal courts to the unlamented era when they passed on the reasonableness of state and local legislation. *See* Petition for Writ of Certiorari, No. 93-841, at 23-27. However, if Int. No. 71-A is to be scrutinized for reasonableness under section 1 of the Sherman Act, the review should include consideration of the full array of factors that led New York City to pass the legislation.

Hertz offers just two cases to support its contention that rule-of-reason analysis encompasses review of economic concerns only: *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) and *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984). *See* Cross-Petition for Writ of Certiorari at 3. However, neither case involves municipal legislation. No conflict with decisions in other circuits is claimed in the cross-petition nor does the Court of Appeals' ruling depart from any clear precedent of this Court.

As the Court of Appeals recognized, the criteria used to assess the reasonableness of business arrangements created by economic actors to maintain a market or enhance their profitability are simply inadequate when applied to municipal legislation, which is often intended to deal with problems such as public health and welfare, community divisiveness, and racial equity, considerations not readily quantifiable in a purely economic analysis. As the Court of Appeals explained, these values, like the system of spirited economic competition protected by the antitrust laws, are also important federal concerns, "embodied in the thirteenth and fourteenth amendments as well as in many of the federal statutes." *Hertz Corp.*, 1 F.3d at 131. Local legislative authority would be significantly curtailed if legislation motivated by noneconomic concerns could be thwarted solely on the basis of its economic impact, with no weight given to the health, safety, or social concerns that might have motivated the legislation. Hertz has not met a petitioner's burden of stating any persuasive reason for this Court to review the Court of Appeals' determination on this issue.

CONCLUSION

THE CROSS-PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

PAUL A. CROTTY,
Corporation Counsel of the
City of New York,
Attorney for Respondents.

LEONARD J. KOERNER,*
LAWRENCE S. KAHN,
ALAN G. KRAMS,

of Counsel.

*Counsel of Record